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Supreme Court of the United States

October Term, 1942.

No. 941.

JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY, Petitioner,

v.

THOMAS J. CASEY, Trustee, Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE FIRST CIRCUIT.**

**BRIEF FOR THE RESPONDENT IN OPPOSITION
TO WRIT OF CERTIORARI.**

THOMAS J. CASEY, Trustee,
Pro se.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

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BRIEF FOR THE RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI.

Opinions of the Courts Below.

The memorandum of decision for injunction entered in the District Court September 16, 1942, is set forth in the record at page 42. The orders of the District Court dated September 16, 1942, appealed from are set forth in the record at pages 22 to 24, inclusive, and the order for turn over dated September 17, 1942, appealed from is set forth in the record at page 41 and the opinion of the Circuit Court of Appeals for the First Circuit dated March 1, 1943, is set forth in the record at pages 51 to 53, inclusive.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of the Bankruptcy

Act, United States Code, 1940 Edition, Title 11, Section 47 C, and under Section 240 of the Judicial Code as amended, United States Code, 1940 Edition, Title 48, Section 347.

Questions Presented.

The questions presented on the record in the case at bar are whether the Circuit Court of Appeals erred in holding the following:

1. That the District Court after approval of a petition under Chapter 10 of the Chandler Act 52 Stat. 840, 11 U. S. C. A., has power to take possession of mortgaged premises, collect the rents and enjoin the mortgagee from interfering therewith by foreclosure or otherwise.
2. That the District Court had properly exercised that power in these proceedings.
3. That the property of the debtor was in *custodia legis* as of the date of the filing of the petition.
4. That possession and collected rents should be turned over to the trustee.
5. That the constitutional rights of the mortgagee under its Massachusetts form of mortgage were not impaired by the orders of the Court but were suspended for the time being for the purposes of the act.

Statutes and Regulations Involved.

Pertinent Sections of the Chandler Act.

Sections 256 and 257 (United States Code, 1940 Edition, Title 11, Sections 656 and 657):

§256. A petition may be filed under this chapter notwithstanding the pendency of a prior mortgage foreclosure, equity, or other proceeding in a court of the United States or of any State in which a receiver or trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made. (July 1, 1898, ch. 541, §256, as added June 22, 1938, ch. 575, §1, 52 Stat. 902.)

§657. The trustee appointed under this chapter, upon his qualification, or if a debtor is continued in possession, the debtor, shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the immediate possession thereof. The trustee or debtor in possession shall also have the right to immediate possession of all property of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage. (July 1, 1898, ch. 541, §257, as added June 22, 1938, ch. 575, §1, 52 Stat. 902.)

Sections 111 to 116 (United States Code, 1940 Edition, Title 11, Sections 511 to 516):

§511. Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located. (July 1, 1898, ch. 541, §111, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§512. Prior to the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding before adjudication. (July 1, 1898, ch. 541, §112, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§513. Prior to the approval of a petition, the judge may upon cause shown grant a temporary stay, until the petition is approved or dismissed, of a prior pending bankruptcy, mortgage foreclosure or equity receivership proceeding and of any act or other proceeding to enforce a lien against a debtor's property, and may upon cause shown enjoin or stay until the petition is approved or dismissed the commencement or continuation of a suit against a debtor. (July, 1898, ch. 541, §113, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§514. Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication. (July 1, 1898, ch. 541, §114, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§515. Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature. (July 1, 1898, ch. 541, §115, as added June 22, 1938, ch. 575, §1, 52 Stat. 884.)

§516. Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—(1) permit the rejection of executory contracts of the debtor, except contracts in the public

authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate; (2) authorize a receiver, trustee, or debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to issue certificates of indebtedness for cash, property, or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable; (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; and (4) in addition to the relief provided by section 29 of this title, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor. (July 1, 1898, ch. 541, §116, as added June 22, 1938, ch. 575, §1, 52 Stat. 885.)

Section 148 (United States Code, 1940 Edition, Title 11, Section 548):

Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property. (July 1, 1898, ch. 541, §148, as added June 22, 1938, ch. 575, §1, 52 Stat. 888.)

Sections 186 and 187 (United States Code, 1940 Edition, Title 11, Sections 586 and 587):

§186. A trustee, upon his appointment and qualification, shall be vested with such title as a trustee appointed

under section 72 of this title would have. (July 1, 1898, ch. 541, §186, as added June 22, 1938, ch. 575, §1, 52 Stat. 892.)

§587. Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 72 of this title, and if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor. (July 1, 1898, ch. 541, §187, as added June 22, 1938, ch. 575, §1, 52 Stat. 892.)

Statement.

Supplementing the statement of the petition the following facts should be called to the attention of the Court:

That from November 1, 1940, the date of the purchase of the hotel known as the Hotel Buckminster from the petitioner until August 1, 1942, all payments under the terms of the mortgage hereinbefore referred to had been met and on August 5, 1942 the date of the filing of the petition the only payment under the terms of the mortgage that was in arrears was the payment due August 1, 1942. That at the time of the filing of the petition, the debtor had paid off \$37,000.00 from the purchase price and had improved the property at considerable expense establishing a substantial equity in the premises. That negotiations were under way for the determination of a rental to be paid by the United States of America for the premises for its use by the United States Army. That the income to be derived under the present offer from the United States of America for the use of such portion of the premises now occupied

by it is \$40,000.00 per year. The Yankee Network, tenants of the debtor under a lease, pays \$13,000.00 per year as rent and the Gulf Oil Company is under an agreement to pay \$4,000.00 per year as rent for the use of a portion of the roof for advertising purposes making a total yearly income of \$57,000.00. Under the terms of the petitioner's mortgages the debtor is obliged to pay a sum not exceeding \$37,000.00 per year which sum includes taxes, interest, and the principal payment under the terms of the mortgage held by the petitioner. This leaves the sum of \$20,000.00 net per year which is available for the payment to creditors and to defray administrative expenses.

On April 12, 1943, the debtor's plan for reorganization was filed which plan provided for:

1. The payment of all mortgage obligations which are in arrears bringing them up to date according to the terms of said mortgage.
2. The payment of all other debts in cash and in full payable 5% the first of each and every month until 100% is paid.
3. Upon final confirmation of the plan by the Court, the entire provisions of the plan will be carried out within sixty days of such confirmation. Such confirmation, however, will be predicated upon the completion of the litigation now pending before the United States District Court for the District of Massachusetts, the Circuit Court of Appeals for the First Circuit and the United States Supreme Court between John Hancock Mutual Life Insurance Company and Thomas J. Casey, trustee of the debtor corporation.

Argument.**I.**

The decision in the instant case is not in conflict with the fundamental principles of the Bankruptcy Act prior to the Chandler Act.

It is contended by the respondent that even under the Federal Bankruptcy Act of 1898, section 70 a, "the trustee of the estate of a bankrupt, upon his appointment and qualification . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt,— (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial processes against him" It must be conceded that at the time of the filing of the petition the debtor had such title as was subject to levy and which could have been sold under judicial process against it and which could have been conveyed by deed.

The question of title must be distinguished from possession and right to possession. It is elementary bankruptcy law and practice that the trustee is entitled to possession of such property as was in the possession of the bankrupt at the time of the filing of the petition. The trustee derives this right from the doctrine *custodia legis* "the exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as in *custodia legis* from the filing of the petition" and that is the case of *Acme Harvester Co. vs. Beekman Co.*, 222 U. S. 300, 56 L. Ed. 208, 32 S. Ct. 96, 27 A. B. R. 262; *Stratton vs. New*, 283 U. S. 318, 75 L. Ed. 1060, 51 S. Ct. 465, 17 A. B. R. (N. S.) 630; *Farmers and Mech.*

Nat. Bank vs. Wilkinson, 295 Fed. 120, 2 A. B. R. (N. S.) 360 (C. C. A. Tex.). To permit a mortgagee to disturb the possession of the Court by the attempted exercise of a right under "power of sale" contained in a mortgage or the attempted taking of possession or the taking of possession without the permission of the Court would be in derogation of the powers of the Court under the doctrine of *custodia legis*. It is fundamental law that governs the right held by one in possession or one having the right to possession to collect rents and profits. *Matter of Bush Terminal Co.*, V. 28 (N. S.), p. 216. *Matter of Associated Gas & Electric Co.*, V. 30 (N. S.), p. 12. *Matter of Nineteenth and Walnut Streets Corp.*, V. 27 (N. S.) p. 321. *Matter of Grand Boulevard Investment Co. v. Strauss*, V. 29 (N. S.).

The determination by the Circuit Court of Appeals herein that the property of the debtor was *in custodia legis* and that the trustee was entitled to possession and entitled to collect the rents were fully authorized by Sections 256 and 257 of the Act which was enacted after the decision of *Tuttle vs. Harris*, 297 U. S. 225, under old 77-B. The orders staying the foreclosure proceedings were amply supported by authority of Sections 111-116 inclusive.

The question of the constitutionality of the powers of the Bankruptcy Court as set forth in former Section 207 of the Act was conclusively determined *In re: New Rochelle Coal & Lumber Co.*, 28 A. B. R. (N. S.) 658; C. C. A., N. Y. 1935, 77 F. (2nd) 881, in which it said, "Former section 207 is constitutional and includes debtor, who, though unable to pay promptly, might be able to pay if time were sufficiently extended." *In re: Brockett v. Winkle Terra Cotta Co.*, C. C. A. Mo. 1936; 81 F. (2nd) 949, 30 A. B. R. (N. S.) 381, it was held; "Under former section 207 it was said that Congress

was not prohibited from impairing obligations of contracts under bankruptcy power, notwithstanding that bankruptcy power was subject to the 5th Amendment, also *In re: Cheney Bros.*, D. C. Conn. 1935, 12 F. Supp. 605; 30 A. B. R. (N. S.) 734. Former section 207 within power granted Congress by bankruptcy clause; Constitution, Art. 1, S. 8, Cl. 4. *Grand Boulevard Investment Co. v. Strauss*, C. C. A. Mo., 1935, 78 F. (2nd) 180; 29 A. B. R. (N. S.) 188.

II

The obvious difference that exists between the old bankruptcy act and the present Chandler Act is that the old bankruptcy act was aimed at the collection of the assets of the bankrupt and the liquidation of such assets and the distribution of such funds obtained in liquidation amongst the creditors of the bankrupt. The intent and purpose of the administration of the assets of a corporation in proceedings for reorganization under Chapter 10 of the Chandler Act is to collect the assets of the debtor corporation and to provide for a reorganization, the ultimate goal of which is to provide the creditors with a greater dividend in the assets of the debtor than that which might be obtained under liquidation and to preserve and rehabilitate the business of the debtor so that it may remain in business and continue as a benefit and an asset to the community as a whole. To effect the goal of reorganization under Chapter 10 of the Chandler Act, the Court was necessarily clothed with greater and far-reaching authority to prevent possible inequities which might occur when a secured creditor would foreclose on its security the effect of which foreclosure would put the debtor out of business and wipe out any possibility of unsecured creditors sharing in the assets of the debtor corporation. In the present matter the mortgages of the

petitioner have as security all of the real property and personal property and the exercise of the "power of sale" contained in these mortgages would effect a result diametrically opposed to the intent and purpose of the Chandler Act. The Honorable Mr. Justice Healey of the District Court for the District of Massachusetts expressed his desire after investigation that the creditors of all classes be paid one hundred cents on the dollar. That the efforts of the trustee and the attorney for the debtor corporation have been strained to accomplish the desire of the Court. That in furtherance of this desire the original offer by the United States Government for the use of the premises of the debtor corporation was raised from the original bid of \$23,000.00 to \$28,000.00 to \$34,000.00 and then to \$40,000.00 per year. That costs of administration were held down to an absolute minimum to make possible the offer of one hundred cents on the dollar to all creditors of all classes.

The District Court and the Circuit Court of Appeals recognized that the security of the petitioner has not been impaired by the granting of an injunction preventing the exercise of the "power of sale" contained in the mortgage hereinbefore mentioned but that the injunction suspended temporarily such "power of sale" for the purposes of the Act.

There is at the present moment sufficient cash in possession of the United States District Court for the District of Massachusetts and in possession of Thomas J. Casey, Esquire, trustee of the debtor corporation to immediately pay to the petitioner the arrears in taxes, interest, and principal payment at present due under the terms of the mortgages as aforesaid.

III.

The reasoning of the Circuit Court of Appeals is not in conflict with the law appertaining to Chapter 10 of the Chandler Act. The law cited in the petitioner's brief has reference to the administration of bankrupt estates prior to the passage of the Chandler Act but such interpretations as had been made subsequent to the passage of the Chandler Act are uniformly in support of the action of the District Court and the Circuit Court of Appeals. The reasoning of the Circuit Court of Appeals was soundly supported by Sections 256 and 257 and Sections 111 to 116 inclusive together with the fundamental proposition that property or property rights of the debtor are *in custodia legis* as of the time of the filing of the petition.

IV.

The case at bar presents no issue of general importance. The petitioner argues:

1. That the decision of the Court below raises a question as to the interpretation of chapter 10 of the Bankruptcy Act where the interest of the mortgagee in title jurisdictions are involved.
2. That there is a serious question as to the constitutionality of the Chandler Act as applied in the present case.
3. That there exists a confusion and diversity as to the proper interpretation of the Chandler Act.
4. That there has been a misinterpretation or improper application of decisions of the Supreme Court by the Circuit Court of Appeals in the present case.

The proposition of reorganization of a corporation under Chapter 10 of the Chandler Act taken in the light of the intent and purposes of the Act together with a thorough understanding of the economic dislocation from which business was suffering at the time of the passage of this Act refutes any contention that the Courts below erred in its interpretation or application.

In the light of recent decisions rendered under Chapter 10 of the Chandler Act, there is no issue presented by the case at bar of general importance.

Conclusion.

It is respectfully submitted that the decision of the Circuit Court of Appeals upholding the findings of the District Court were correct and in accord with established precedent. The petitioner has had a careful review of its contentions and there does not exist any occasion for further review by this Court. There is no conflict of decisions nor even a conflict of reasoning. Nor is the question of the right of Congress to pass legislation, the effect of which will suspend temporarily, a contractual right for the common good. No broad or doubtful question of great moment is presented for settlement. It is accordingly submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS J. CASEY, *Trustee.*
Pro se.